IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALVATORE SCIGLITANO,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 00-CV-0083
JOHN ASHCROFT,	:	
United States Attorney General, et al.,	:	
Respondents.	:	

MEMORANDUM

Green, S.J. **March _____, 2002**

Presently before the Court are the following: (1) Petitioner's Amended Petition for Writ of Habeas Corpus, Respondents' Response and Petitioner's Reply; and (2) Petitioner's Motion for an Order to Release Respondent from Detention. For the foregoing reasons, Petitioner's motions will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1972, Petitioner, Salvatore Sciglitano, a native and citizen of Italy, lawfully entered the United States. In April 1986, he adjusted his status to permanent resident. Since that time, Petitioner married a U.S. citizen and has four children who are also U.S. citizens.

On September 25, 1995, Petitioner was convicted in the United States District Court for the Northern District of New York of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. §§ 841 and 846 (1995). He was sentenced to sixty-three (63) months imprisonment. On November 29, 1995, during Petitioner's incarceration, the Immigration and Naturalization Service ("INS") commenced removal proceedings against Petitioner by issuing to Petitioner an Order to Show Cause, alleging that as an alien convicted of an aggravated felony and a controlled substance offense he was subject to deportation under the Immigration and Naturalization Act of

1952, ("INA") § 241(a)(2)(A)(iii) (allowing deportation for conviction of an aggravated felony) and § 241(a)(2)(B)(i) (allowing deportation for certain narcotics convictions). See 8 U.S.C. § 1251(a)(2)(A)(iii), (B)(i) (1994).[1] The INS, however, failed to file the Order to Show Cause with the Immigration Court, as required by regulation, to commence deportation proceedings. See 8 C.F.R. § 3.14 (1999).[2]

During Petitioner's incarceration, Congress amended the INA with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (enacted and effective April 24, 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546 (enacted on September 30, 1996 and effective on April 1, 1997) which significantly altered the nature of discretionary relief aliens could seek from deportation by narrowing the rights of certain classes of aliens. Prior to these amendments, Section 212(c) of the INA granted the Attorney General broad discretion to admit excludable aliens who were permanent resident aliens with seven consecutive years of "lawful unrelinquished domicile."[3] See 8 U.S.C. § 1182(c). Although § 212(c) was facially applicable only to exclusion proceedings, the Board of Immigration Appeals

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[1]In 1996, these sections were transferred to 8 U.S.C. § 1227(a)(2)(A)(iii) (relating to conviction for "aggravated felony") and 8 U.S.C. § 1227(a)(2)(B)(i) (relating to conviction for a controlled substance offense).

[2]In 1995, the regulation provided: "Every proceeding to determine the deportability of an alien in the United States, . . . is commenced by the filing of an order to show cause with the Office of the Immigration Judge." 8 C.F.R. § 242.1 (1995) (repealed).

[3]It stated: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ." Aliens convicted of an aggravated felony with a term of imprisonment of more than five years, however, were ineligible for § 212(c) relief.

("BIA") interpreted it to apply to discretionary waivers from deportation. See Matter of Silva, 16 I. & N. Dec. 26, 30, 1976 WL 32326 (1976). The AEDPA, *inter alia*, restricted the availability of

§ 212(c) relief by listing a broad range of offenses for which conviction would preclude such relief. See AEDPA § 440(d).[4]

The IIRIRA, enacted by Congress later that same year, expanded the AEDPA's habeas reforms by, *inter alia*, repealing § 212(c) and replacing it with a section that granted the Attorney General the authority to grant discretionary relief to a narrow class of aliens such that aliens convicted of an aggravated felony, like Petitioner, were precluded from such relief. The IIRIRA also established both permanent and transitional rules. The permanent rules apply to cases in which the INS instituted removal proceedings on or after April 1, 1997. See IIRIRA § 306(b); IIRIRA § 309(a). The transitional rules, however, apply to cases where the INS began removal proceedings prior to April 1, 1997 and a resulting deportation order became final after October 30, 1996. See IIRIRA § 309(c)(4).

Pursuant to these amendments, on February 11, 1999, the Attorney General issued a Notice to Appear under IIRIRA § 309(c)(2), which authorized the Attorney General to either treat pending deportation cases under the IIRIRA or terminate the pending case and re-commence under the new "removal proceedings." The Attorney General, choosing the latter option, re-

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[4]The AEDPA also restricted judicial review of deportation orders. Prior to the AEDPA, aliens could seek judicial review of deportation orders by petitioning for review in the Court of Appeals as well as under INA § 106(a)(10), which provided for review of deportation orders by habeas corpus proceedings. Section § 401(e) of the AEDPA eliminated INA § 106(a)(10) and § 440(a) of the AEDPA replaced the language of INA § 106(a)(10) with the following: "Any final order of deportation against an alien who is deportable for reason of having committed [certain criminal offenses] shall not be subject to review by any court." AEDPA § 440(a).

commenced removal proceedings against Petitioner, alleging that he was deportable based upon his convictions. Several days later, on February 17, the Notice to Appear was filed with the Immigration Court.

On May 11, 1999, removal proceedings were held before an Immigration Judge ("IJ"). The IJ concluded that Petitioner was statutorily ineligible for a § 212(c) waiver because Petitioner's case had not commenced until February 17, 1999, when the Notice to Appear was filed with the Immigration Court. The IJ reasoned that even though the Order to Show Cause was issued and served in 1995, prior to the effective date of the AEDPA, since it was never filed with the Immigration Court, Petitioner's case had not commenced as of the effective date of the AEDPA, and therefore, Petitioner was subject to the IIRIRA's repeal of the § 212(c) waiver. On November 26, 1999, the BIA denied Petitioner's appeal and affirmed the IJ's ruling.

On January 5, 2000, Petitioner sought review of the BIA's decision, claiming that because the INS issued and served an Order to Show Cause in 1995, his deportation case was pending as of the effective date of the AEDPA. Petitioner also asserted that the INS's application of AEDPA § 440(d) is retroactive in violation of substantive due process under the Fifth Amendment to the United States Constitution. On or about May 23, 2000, this Court partially granted Petitioner's petition, concluding that once the INS issued and served the Order to Show Cause, Petitioner's case was "constructively pending," and as such, Petitioner's case was pending as of 1995. Since the 1996 amendments do not apply retroactively, the Court held that Petitioner was entitled to apply for relief under § 212(c) and the IJ and BIA should have considered the

merits of Petitioner's application under § 212(c).[5] Consequently, the Court enjoined Petitioner's expulsion and directed the Attorney General to consider Petitioner's § 212(c) claim on the merits. No appeal was taken from this order. Instead, a hearing was scheduled before an IJ.

On June 3, 2001, the IJ, pursuant to this Court's order, granted Petitioner a § 212(c) waiver, concluding that Petitioner had demonstrated "unusual and outstanding equities" which warranted such a finding in his favor. The INS appealed the IJ's decision to the BIA. On November 11, 2001, the BIA, upon consideration of the same body of evidence, concluded that although Petitioner had demonstrated "the existence of outstanding equities in his favor," the Board did not believe that "his equities in this country [came] close to outweighing the adverse factors present." Consequently, the BIA reversed the IJ's grant of a § 212(c) waiver to Petitioner and ordered Petitioner deported to Italy.

On or around December 10, 2001, Petitioner filed an Amended Petition for Writ of Habeas Corpus challenging the BIA's reversal of the IJ's decision, claiming that the decision did not provide him due process. Respondents argue that this Court lacks subject matter jurisdiction because federal courts have no authority to review discretionary denials of § 212(c) waivers from deportation. Thereafter, on December 28, 2001, Petitioner filed a Motion for an Order to Release Respondent from Detention.

II. DISCUSSION

In his Amended Petition, Petitioner claims harm to his constitutional rights under the Fifth Amendment Due Process Clause and seeks review of the BIA's reversal of the IJ's decision

[5]The Court did not reach the question of whether the retroactive application of AEDPA § 440(d) violates substantive due process.

granting Petitioner a § 212(c) waiver. Upon consideration of the parties' pleadings, it is apparent that neither party challenges that the Court retains subject matter jurisdiction under § 2241, the general habeas statute, despite the amendments to the INA. The recent Supreme Court decision in INS v. St. Cyr, 121 S.Ct. 2271 (2001) firmly established that neither the AEDPA nor the IIRIRA repeals habeas review under § 2241.[6]

Rather, the dispute rests on whether Petitioner's allegations constitute a bona fide claim for legal error such that this Court retains jurisdiction over the instant petition. If Petitioner's claim of legal error is valid, federal habeas jurisdiction is appropriate, because it is well-settled that habeas courts regularly answer questions of law in the context of discretionary relief. See id. at 2283;see also Henderson v. I.N.S., 157 F.3d 106, 120 (2d Cir. 1998) (holding that "courts have the power to address pure questions of law presented in the instant cases").

Petitioner contends that he raises a claim for "pure legal error" by alleging that the inferences drawn by the BIA are not supported by the record. Specifically, Petitioner alleges that the BIA's refusal to consider certain evidence, its discounting of other evidence and failure to

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[6]The Court cited two rationales underlying its decision: (1) the "strong presumption in favor of judicial review of administrative action"; and (2) the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." Id. at 2278. The Court reasoned that the former rationale is rooted in the Suspension Clause of the U.S. Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion of the Public Safety may require it." Id. at 2279;Art. I, § 9, cl. 2. As such, the Court reasoned that "'judicial intervention in deportation cases' is unquestionably required by the Constitution." Id. at 2279 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)). The latter rationale is based upon the well-settled idea that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." Id. at 2278-79. Finding that no provision of either the AEDPA or IIRIRA "[stated] with sufficient clarity to bar jurisdiction," the Court held that federal courts retain jurisdiction pursuant to § 2241, the general habeas statute. Id. at 2284-2287.

follow its own precedent guidelines were in violation of his due process rights under the Fifth Amendment.

I find Petitioner's arguments unpersuasive. He points to no process that has been denied. Petitioner was granted a hearing, testified and presented evidence on his own behalf, and a record was created and disclosed to him. Moreover, Petitioner's allegation that the inferences drawn by the BIA were not supported by the record is without merit. Although the IJ drew more inferences favorable to him than the BIA, that is a matter of discretion, not due process.

Having determined that Petitioner cannot point to a due process violation, Petitioner requests that this Court review the discretionary decision made by the BIA. Yet, the transitional rules, which apply to cases, like Petitioner's, where the INS began removal proceedings prior to April 1, 1997 and a deportation order became final after October 30, 1996, are clear: "there shall be no appeal of any discretionary decision under section 212(c) . . . . " IIRIRA § 309(c)(4)(E). Further, Petitioner points to no case which permits this Court to review such a discretionary decision. In fact, all cases support the preclusion of such review. See St. Cyr, 121 S.Ct. at 2278, 2283 (making a distinction between the "eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion of the other hand," by noting that Petitioner's "application for a writ raises a pure question of law [rather than disputes] any of the facts that establish his deportability or the conclusion that he is deportable. Nor does he contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum"); Goncalves v. Reno, 144 F.3d 110, 125 (1st Cir. 1998) (emphasizing that the district court retained jurisdiction over petitioner's writ of habeas corpus because it was "not being asked to review [] and reverse the manner in which discretion was exercised by examining the evidence

in the record supporting or undermining the alien's claim to discretionary relief") (alterations in original) (quotation omitted)); Bowrin v. INS, 194 F.3d 483, 490 (4th Cir. 1999) (holding that "[o]nly questions of pure law will be considered on § 2241 habeas review [and that] [r]eview of factual or discretionary issues is prohibited"); Sol v. I.N.S., 274 F.3d 648, 651 (2d Cir. 2001) (stating that a "fact intensive review is vastly different from what the habeas statute plainly provides: review for statutory or constitutional errors.")

Therefore, because habeas review does not lie in the discretionary decisions of the INS and because Petitioner raises no constitutional or statutory claim, it does not appear that Petitioner presents the type of claim that is cognizable on habeas review. I agree with Respondents that the "rote recitation of due process" is insufficient to create jurisdiction in this Court. Despite Petitioner's denials to the contrary, Petitioner's claim amounts to the contention that the BIA erred in the exercise of its discretion in denying his application for discretionary relief. Accordingly, because the claims raised in the instant petition fall outside the ambit of habeas review, I will dismiss Petitioner's amended petition for writ of habeas corpus as well as his petition to release him from detention for lack of subject matter jurisdiction.

An appropriate order follows.

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v.	:	
	:	NO. 00-CV-0083
JOHN ASHCROFT,	:	
United States Attorney General, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this _____ day of March, 2002, upon consideration of Petitioner's Amended Petition for Writ of Habeas Corpus, Respondents' Response and Petitioner's Reply and Petitioner's Motion for an Order to Release Respondent from Detention, **IT IS HEREBY ORDERED** that:

1. Petitioner's Amended Petition for Writ of Habeas Corpus is **DENIED**; and

2. Petitioner's Motion for an Order to Release Respondent from Detention is **DENIED**.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.